

September 23, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Federation of American Scientists

Date of Filing: October 6, 2004

Case Number: TFA-0075

The Federation of American Scientists (Federation) filed an Appeal from a determination that the Office of Intelligence of the Department of Energy issued on September 29, 2004. In that determination, the Office of Intelligence denied in part a request for a copy of the fiscal year 2005 budget request for that office, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Upon receiving the Federation's request, the Office of Intelligence requested that the Office of Classification and Information Control (OCIC) of the DOE's Office of Security review the requested document. OCIC determined that portions of the requested document contain information properly classified as National Security Information and must therefore be withheld under Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1). This Appeal, if granted, would require the DOE to release the requested document in its entirety.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On February 4, 2004, the Federation requested a copy of the fiscal year 2005 budget request for the DOE's Office of Intelligence. The Office of Intelligence requested that the OCIC perform a classification review of the requested document. The OCIC completed its review, delivering a redacted version of the document to the Office of Intelligence, from which portions of the document had been excised. Those portions contained material the OCIC determined was classified information. The OCIC also recommended that the Central Intelligence Agency (CIA) review this document; the CIA determined in its review that CIA information contained in the document could be released in its entirety. The Office of Intelligence then issued a determination letter to the Federation, together with redacted

version of the requested document. In its determination letter, the Office of Intelligence explained that the portions of the document being withheld from public release contained information properly classified as National Security Information pursuant to sections 1.5(a), (b), (c), (d), and (e) of Executive Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA.*

The present Appeal seeks the disclosure of the withheld information described above. In its Appeal, the Federation presents two arguments in favor of releasing the budget request in its entirety: (1) The DOE has the discretion to release the entire 2005 budget request under 10 C.F.R. § 1004.1, in the public interest, as it has in previous years, and (2) to the extent that the requested document contains prior-year information that has been released, the DOE has waived its ability to withhold this same information now.

II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed the requested document for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, the material the DOE withheld from the document must continue to be withheld, because it constitutes classified information that is intelligence-related. The information that the DOE continues to withhold concerns military plans, weapons systems, or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; and scientific, technological, or economic matters relating to the national security. This information is currently classified as National Security Information (NSI) under sections 1.4(a), (b), (c), (d), and (e) of Executive Order 12958, and is identified as “DOE b(1)” in the margin of a redacted version of this document, which will be provided to the Federation under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under

* Section 1.5, Classification Categories, was renumbered as Section 1.4 in a March 23, 2003 amendment to Executive Order 12958. *See* Executive Order 13292, 68 Fed. Reg. 15315 (March 28, 2003).

Exemption 1 of the FOIA. The denying official for the DOE's withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

Based on the Director's review, we have determined that Executive Order 12958 requires that the DOE continue withholding portions of the requested document under consideration in this Appeal. Although we agree with the appellant that a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 1, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has determined to be properly classified must continue to be withheld from disclosure. Accordingly, the Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Federation of American Scientists on October 6, 2004, Case No. TFA-0075, is hereby denied.
- (2) A redacted version of the fiscal year 2005 budget request for the Department of Energy's Office of Intelligence will be provided to the Federation of American Scientists.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 23, 2005